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No. 91-511

Supreme Court, U.S.

FILED

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1991

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DOW CHEMICAL, USA,  
*Petitioner,*  
v.

MR. & MRS. JESSE PINION,  
*Respondents.*  
\_\_\_\_\_

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit  
\_\_\_\_\_

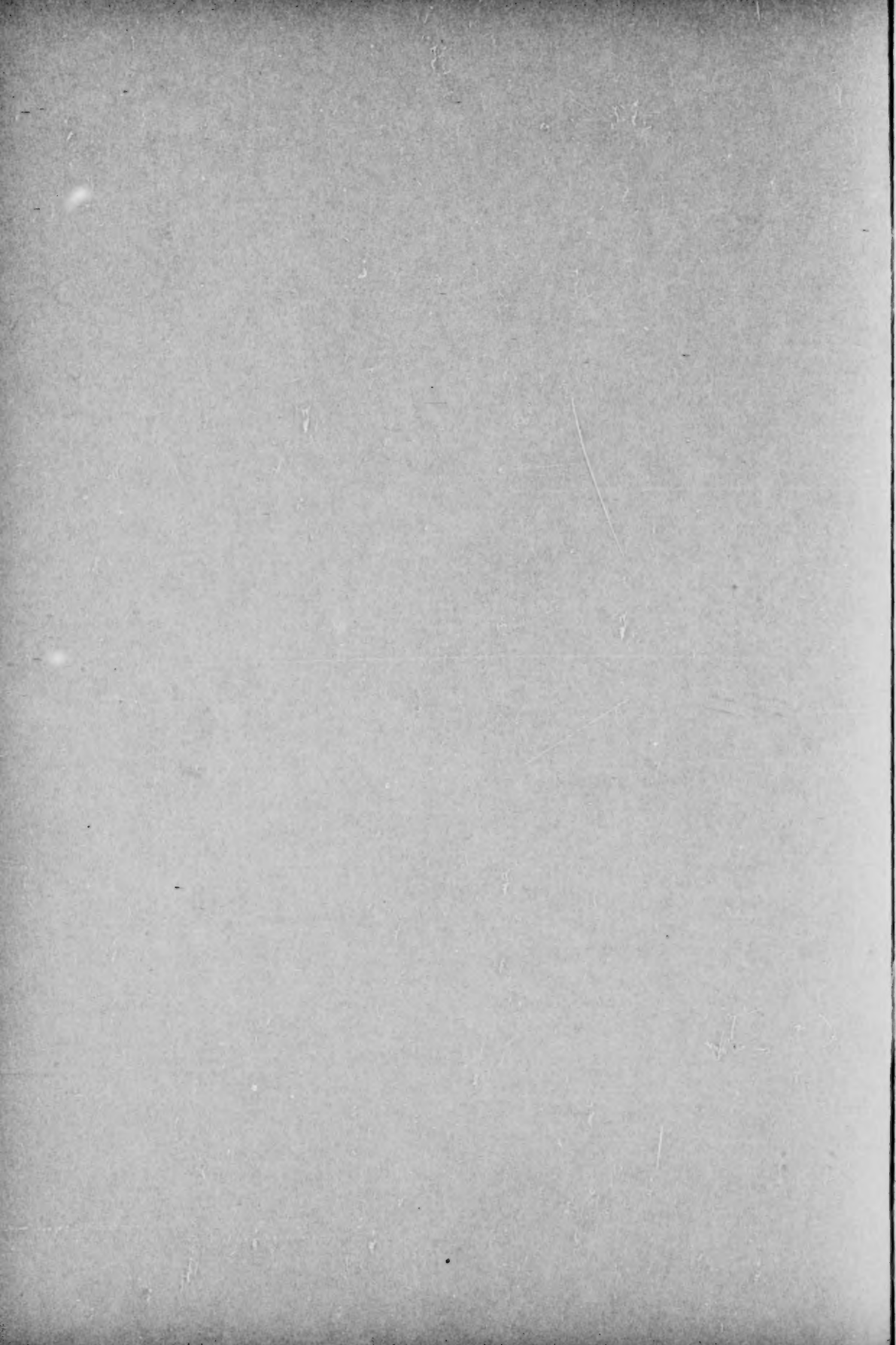
**REPLY BRIEF IN SUPPORT OF PETITION  
FOR A WRIT OF CERTIORARI**  
\_\_\_\_\_

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\* There have been no changes in the parties to the proceedings listed on pages ii-x of the petition.

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Respondents pay lip service to the “equitable doctrine” in *Wolfsohn v. Hankin*, 376 U.S. 203 (1964), but never address the “unseemly” fact that they come without “clean hands,” having consented to the time extension they now attack in order to preserve a \$2.45 million judgment.<sup>1</sup> Resp. Op. at 4; *Pinion v. Dow Chem., U.S.A.*, 928 F.2d 1522, 1537-38 (11th Cir. 1991) (Johnson, J., dissenting). Instead, Respondents misrepresent the facts in *Wolfsohn* to claim no conflict with the decision below, pretend the circuits are in harmony despite more than fifty-seven “unique circumstances” opinions over the last decade,<sup>2</sup>

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<sup>1</sup> Of the judgment, \$2 million consists of punitive damages challenged on the merits by Petitioner before the Eleventh Circuit.

<sup>2</sup> See Appendix listing by circuit all “unique circumstances” cases since 1981 found by our Lexis search.

and argue that the “unique circumstances” doctrine of *Wolfsohn* must give way to the “mandatory jurisdictional” provisions of the Federal Rules. Resp. Op. at 5. Each of Respondents’ points is treated below.

1. *Wolfsohn* is on “all-fours” with this case. Respondents claim that *Wolfsohn* is distinguishable from the instant case because “the petitioner . . . filed a motion to extend the time” for post-trial motions due to the fact that “[h]er counsel was hospitalized at the time, recovering from an illness involving surgery.” Resp. Op. at 6 (emphasis added). In fact, as the certiorari petition and opposition in *Wolfsohn* show, petitioner’s counsel—not petitioner—prepared her time extension notice; moreover, her counsel was not “disabled” from filing either that motion or the subsequent motion for rehearing on the merits.<sup>3</sup> Neither this Court nor any circuit after *Wolfsohn* has ever once mentioned counsel’s illness in discussing the “unique circumstances” that warranted allowing *Wolfsohn*’s technically untimely appeal.

2. Respondents all but admit a conflict among the circuits. Under a heading claiming that there “is no substantial conflict,” Respondents acknowledge that there are “varying verbal formulations” of the “unique circumstances” doctrine but that these are not “sufficient” to warrant certiorari. Resp. Op. at 7 (emphasis added). In fact, what Respondents call “varying verbal formulations” are different, outcome-determinative rules.

*Fairley v. Jones*, 824 F.2d 440 (5th Cir. 1987), for example, applied the doctrine to allow an appeal on facts identical to those here. To be sure, appellant was *pro se* but the critical factor for the Fifth Circuit was that Ms. Fairley, like Ms. *Wolfsohn* and Petitioner here, “sought the extension within the ten-day limit for filing a motion for new trial.” *Id.* at 443. Likewise, *Aviation Enters., Inc. v. Orr*, 716 F.2d 1403, 1406 n.25 (D.C. Cir. 1983), applied the “unique circumstances” doctrine, not in dic-

<sup>3</sup> *Wolfsohn* Cert. Pet. at 4; *Wolfsohn* Cert. Op. at 6-7.

tum, but as an alternative holding that permitted the court to avoid deciding which of two orders triggered the right to appeal. Nor do Respondents even attempt to distinguish *Webb v. Department of Health and Human Servs.*, 696 F.2d 101, 106 (D.C. Cir. 1982), which applied the “unique circumstances” doctrine despite the fact that “Webb did not rely on an express statement by the district court” that his subsequent appeal would be timely.

3. *Respondents’ argument for avoiding plenary review here depends upon replacing the “unique circumstances” doctrine with a “mandatory jurisdictional” rule.* Like many of the circuit opinions, Respondents claim to accept *Wolfsohn’s* continued vitality while actually arguing that strict compliance with the ten-day requirement for post-trial motions is “a mandatory jurisdictional act.” Resp. Op. at 5. Respondents’ jurisdictional characterization puts the issue exactly backwards. This Court in *Wolfsohn* allowed an exception to the time extension preclusion of Fed. R. Civ. P. 6(b) precisely because the Federal Rules, like this Court’s own rules, “are *not jurisdictional* and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require.” *Schacht v. United States*, 398 U.S. 58, 64 (1970) (emphasis added).

The mistaken view that the time extension preclusion in Fed. R. Civ. P. 6(b) is jurisdictional underlies the *de facto* overruling by several circuits of this Court’s “unique circumstances” trilogy. See Cert. Pet. at 10-11. Those courts rely heavily on cases like *Browder v. Director, Dep’t of Corrections of Ill.*, 434 U.S. 257, 264 (1978), which depend upon the statutory 30-day limit for appeal, rather than on the non-statutory, court-made procedural rules that are the subject of the “unique circumstances” doctrine.<sup>4</sup> Just as the statutory limit in *Browder* was set

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<sup>4</sup> But cf. *Needham v. White Laboratories, Inc.*, 454 U.S. 927 (1981) (Rehnquist, J., dissenting from denial of certiorari in “unique circumstances” case on the ground that *Browder* applies to time limits in rules promulgated by the Judicial Branch).

by Congress and can only be changed by Congress, so too the “unique circumstances” rule in *Wolfsohn* was established by this Court and can only be changed by this Court. *Houston v. Lack*, 487 U.S. 266 (1988). *See also* Scalia, J., dissenting, 487 U.S. at 284 (noting the same result might be achieved by an amendment of the rules).

### CONCLUSION

This case is identical to *Wolfsohn* and accordingly should be summarily reversed. The “unique circumstances” doctrine upon which *Wolfsohn* is based has spawned at least fifty-seven circuit decisions over the past decade, some following *Wolfsohn* but others purporting to modify this Court’s test because of inapposite decisions interpreting statutory time limits for appeal. Unless summarily reversed, the Court should grant certiorari here to decide the application of truly “jurisdictional” decisions like *Browder* to this Court’s authority in “unique circumstances” to relax time limits in the Federal Rules.

Respectfully submitted,

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**APPENDIX****District of Columbia Circuit**

*Kropinski v. World Plan Executive Council—US*, 853 F.2d 948 (D.C. Cir. 1988).

*Center For Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Commission*, 781 F.2d 935 (D.C. Cir. 1986).

*Ashby Enterprises, Ltd. v. Weitzman, Dym & Associates*, 780 F.2d 1043 (D.C. Cir. 1986).

*Aviation Enters., Inc. v. Orr*, 716 F.2d 1403 (D.C. Cir. 1983).

*Webb v. Dep't of Health and Human Servs.*, 696 F.2d 101 (D.C. Cir. 1982).

**Second Circuit**

*Long Island Radio Co. v. National Labor Relations Board*, 841 F.2d 474 (2d Cir. 1988).

**Third Circuit**

*Transcontinental Leasing, Inc. v. Michigan National Bank Detroit*, Nos. 90-1223, 90-1224, 90-1247 (3d Cir. September 5, 1991).

*Kraus v. Consolidated Rail Corp.*, 899 F.2d 1360 (3d Cir. 1990).

*United States v. Huebel*, 864 F.2d 1104 (3d Cir. 1989).

*Smith v. Evans*, 853 F.2d 155 (3d Cir. 1988).

*Grandison v. Moore*, 786 F.2d 146 (3d Cir. 1986).

*Fuente v. Central Electric Cooperative, Inc.*, 703 F.2d 63 (3d Cir. 1983).

**Fourth Circuit**

*Jones v. AT&T Technologies, Inc.*, No. 90-2921 (4th Cir. August 30, 1991).

**Fifth Circuit**

*Allied Steel v. City Of Abilene*, 909 F.2d 139 (5th Cir. 1990).

*Mann v. Director, Texas Department of Corrections*, 840 F.2d 1194 (5th Cir. 1988).

*Fairley v. Jones*, 824 F.2d 440 (5th Cir. 1987).

*Equal Employment Opportunity Commission v. Southern Pacific Transportation Company*, 799 F.2d 1076 (5th Cir. 1986).

*Curacao Drydock Co. v. The M/V Akritas*, 710 F.2d 204 (5th Cir. 1983).

*Alvestad v. Monsanto Co.*, 671 F.2d 908 (5th Cir. 1982).

**Sixth Circuit**

*Ageel v. Seiter*, 826 F.2d 1062 (6th Cir. 1987).

*Kentucky Association Of Electric Cooperatives, Inc. v. Local Union No. 369, International Brotherhood of Electrical Workers, AFL-CIO*, 780 F.2d 1021 (6th Cir. 1985).

*Baker v. Chagrin Valley Medical Corp.*, 779 F.2d 49 (6th Cir. 1985).

**Seventh Circuit**

*United States v. Dumont*, 936 F.2d 292 (7th Cir. 1991).

*Varhol v. National Railroad Passenger Corporation*, 909 F.2d 1557 (7th Cir. 1990).

*Woodall v. The Drake Hotel, Inc.*, 892 F.2d 625 (7th Cir. 1989).

*Green v. Bisby*, 869 F.2d 1070 (7th Cir. 1989).

*Parke-Chapley Construction Co. v. Cherrington*, 865 F.2d 907 (7th Cir. 1989).

*Reinsurance Company of America, Inc. v. Administratia Asigurarilor de Stat*, 808 F.2d 1249 (7th Cir. 1987).

*Sonicraft, Inc. v. N.L.R.B.*, 814 F.2d 385 (7th Cir. 1987).

*Labuguen v. Carlin*, 792 F.2d 708 (7th Cir. 1986).

*Mayer v. Angelica*, 790 F.2d 1315 (7th Cir. 1986).

*Bailey v. Sharp*, 782 F.2d 1366 (7th Cir. 1986).

*Wort v. Vierling*, 778 F.2d 1233 (7th Cir. 1985).

*Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106 (7th Cir. 1984).

*Parisie v. Greer*, 705 F.2d 882 (7th Cir. 1983).

*Needham v. White Laboratories, Inc.*, 639 F.2d 394 (7th Cir.) *cert. denied*, 454 U.S. 927 (1981).

#### **Eighth Circuit**

*Hable v. Pairolero*, 915 F.2d 394 (8th Cir. 1990).

*Insurance Company of North America v. Bay*, 784 F.2d 869 (8th Cir. 1986).

#### **Ninth Circuit**

*Shurance v. Planning Control International, Inc.*, No. 89-55887 (9th Cir. Jan. 8, 1991).

*In re Slimick*, 928 F.2d 304 (9th Cir. 1990).

*In re Frederick*, 115 Bankr. 661 (9th Cir. Bankr. Panel 1990).

*United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989).

*Barry v. Bowen*, 825 F.2d 1324 (9th Cir. 1987).

*In re Provan*, 74 Bankr. 717 (9th Cir. Bankr. Panel 1987).

*Alaska Limestone Corp. v. Hodel*, 799 F.2d 1409 (9th Cir. 1986).

*Fiester v. Turner*, 783 F.2d 1474 (9th Cir. 1986).

*United Artists Corp. v. La Cage Aux Folles, Inc.*, 771 F.2d 1265 (9th Cir. 1985).

*People of the State of California v. Tahoe Regional Planning Agency*, 766 F.2d 1316 (9th Cir. 1985).

*National Industries, Inc. v. Republic National Life Insurance Co.*, 677 F.2d 1258 (9th Cir. 1982).

*Donnell v. Commissioner of Internal Revenue Service*, 639 F.2d 535 (9th Cir. 1981).

#### **Tenth Circuit**

*Certain Underwriters at Lloyds of London v. Evans*, 896 F.2d 1255 (10th Cir. 1990).

*Stauber v. Kieser*, 810 F.2d 1 (10th Cir. 1982).

#### **Eleventh Circuit**

*Pinion v. Dow Chemical, U.S.A.*, 928 F.2d 1522 (11th Cir. 1991).

*Butler v. Coral Volkswagen, Inc.*, 804 F.2d 612 (11th Cir. 1986).

*Inglese v. Warden, U.S. Penitentiary*, 687 F.2d 362 (11th Cir. 1982).

#### **Other**

*United States v. Beacon Bay Enterprises, Inc.*, 840 F.2d 921 (Temp. Emer. Ct. App. 1988).

*Sofarelli Associates, Inc. v. United States*, 716 F.2d 1395 (Fed. Cir. 1983).

